

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 1, 2016

Diane M. Fremgen
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2015AP1153-CR

Cir. Ct. No. 2013CF1700

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

STATE OF WISCONSIN,

PLAINTIFF-RESPONDENT,

V.

JAMES JOHNSON,

DEFENDANT-APPELLANT.

APPEAL from a judgment and an order of the circuit court for Milwaukee County: MEL FLANAGAN, Judge. *Affirmed.*

Before Curley, P.J., Kessler and Brash, JJ.

¶1 PER CURIAM. James Johnson appeals from an amended judgment of conviction, entered upon his guilty pleas, for one count of substantial

battery and one count of attempted false imprisonment, both as domestic abuse incidents. *See* WIS. STAT. §§ 940.19(2), 940.30, 939.32, 968.075(1)(a) (2013-14).¹ The judgment included domestic abuse surcharges under WIS. STAT. § 973.055. Johnson also appeals the order denying his postconviction motion. He seeks to have all references to the domestic abuse modifier stricken from the amended judgment of conviction and requests that the domestic abuse surcharges be vacated. Because there was an adequate factual basis to establish a qualifying relationship for the domestic abuse modifier and the circuit court made the requisite finding to support the domestic abuse surcharges, we affirm.

I. BACKGROUND

¶2 According to the complaint, the victim told police that Johnson was upset with her over a television she gave to her niece. She relayed that Johnson threw her onto the bed and began to choke her. When the victim said she could not breathe, Johnson got off of her. As soon as he got to his feet, he grabbed her, pulled her off the bed, and began to choke her again. He also shoved her face into a pillow.

¶3 When the victim tried to call 911, Johnson grabbed the phone and threw it against the wall causing it to break. When the victim grabbed her cell phone and tried to run to the neighbor's apartment, Johnson broke that phone too and blocked the door with a chair so that she could not leave. He punched the victim in the face and continued to choke her. At one point, the victim urinated on herself. When she made another attempt to escape, Johnson caught her and told

¹ All references to the Wisconsin Statutes are to the 2013-14 version unless otherwise noted.

her to take her clothes off, making a comment to the effect that she would not want to run away when she was naked. She took her pants off, and Johnson went to the kitchen.

¶4 The victim then attempted another escape, this time making it to the hallway where she knocked on her neighbor's door. Johnson caught her and dragged her back into the apartment by her shirt and hair. He began to choke her again. Seconds later, the police kicked in the door.

¶5 Johnson initially was charged with two counts of strangulation and suffocation, one count of misdemeanor battery, two counts of felony intimidation of a victim, and one count of false imprisonment, all as acts of domestic abuse.

¶6 On the day his trial was to begin, Johnson pled to amended charges: the first count of strangulation and suffocation was amended to substantial battery and the count of false imprisonment was amended to attempted false imprisonment. The remaining counts were dismissed and read in for sentencing purposes.

¶7 The parties stipulated to the criminal complaint as a factual basis for Johnson's pleas. The circuit court accepted Johnson's pleas and sentenced him to three years of imprisonment on the count of substantial battery and two years and six months of imprisonment on the count of attempted false imprisonment, to run consecutively. The circuit court further ordered Johnson to pay all fees including the \$100 domestic abuse surcharge on both counts.

¶8 A no-merit appeal was filed on Johnson's behalf. During our review of the record, we concluded a supplemental report was necessary regarding whether there was any arguable merit to a challenge to the use of the domestic

abuse modifier, *see* WIS. STAT. § 968.075(1)(a), and to the imposition of the domestic abuse surcharges, *see* WIS. STAT. § 973.055(1). Instead of filing a supplemental report, counsel moved to voluntarily dismiss the no-merit appeal and subsequently filed a postconviction motion. Johnson moved the circuit court for an order striking all references in the judgment of conviction to the domestic abuse modifier and vacating the domestic abuse surcharges.

¶9 The circuit court denied Johnson’s motion in a six-page decision. This appeal follows.

II. DISCUSSION

(A) *There was an adequate factual basis to establish a qualifying relationship for the domestic abuse modifier.*

¶10 Johnson first argues the domestic abuse modifier was improperly applied because the factual basis for his guilty pleas failed to establish the necessary qualifying relationship for “domestic abuse,” as defined in WIS. STAT. § 968.075(1)(a).

¶11 “Domestic abuse” is not a standalone crime but, rather, a modifier that can be attached to other offenses. Whether an offense qualifies as “domestic abuse” within the meaning of WIS. STAT. § 968.075(1)(a) is a mixed question of fact and law. *See State v. Schmidt*, 2004 WI App 235, ¶13, 277 Wis. 2d 561, 691 N.W.2d 379. This court applies a “clearly erroneous” standard of review to a circuit court’s factual findings. *See id.* Here, the parties stipulated to the criminal complaint as the factual basis for Johnson’s pleas to substantial battery and attempted false imprisonment. Whether those undisputed facts qualify as “domestic abuse” under § 968.075(1)(a) is therefore a legal question subject to our independent review. *See Schmidt*, 277 Wis. 2d 561, ¶13.

¶12 WISCONSIN STAT. § 968.075 sets forth the definition of domestic abuse as follows:

(1) DEFINITIONS. In this section:

(a) “Domestic abuse” means any of the following engaged in by an adult person against his or her spouse or former spouse, against an adult with whom the person resides or formerly resided or against an adult with whom the person has a child in common:

1. Intentional infliction of physical pain, physical injury or illness.
2. Intentional impairment of physical condition.
3. A violation of s. 940.225(1), (2) or (3).
4. A physical act that may cause the other person reasonably to fear imminent engagement in the conduct described under subd. 1., 2. or 3.

¶13 Johnson argues that the complaint lacked any facts establishing that he and the victim were either married or formerly married, that they resided together or had formerly resided together, or that they had a child in common, as required by WIS. STAT. § 968.075(1)(a). During the plea colloquy, Johnson acknowledged that the facts contained in the complaint were true and correct, the parties agreed that the complaint would constitute the factual basis for the pleas, and the court stated that it would rely upon the facts in the complaint.

¶14 The heading of the criminal complaint included Johnson’s address at the time of offense. This was the same address as where the acts were alleged to have occurred and as where the victim lived. As specifically alleged in the complaint, “[the victim] stated she ... made it into the hallway and began to knock on *her neighbor’s* door. The defendant again caught her and dragged her by her shirt and hair back to *her apartment.*” (Emphasis added.) Additionally, the

complaint relayed that “[t]he police also spoke to Tamichael Jackson who told them she called the police because she heard the disturbance and is [*the victim’s*] neighbor.”² (Emphasis added.)

¶15 Also, during the plea colloquy, the circuit court informed Johnson that the charge of attempted false imprisonment was alleged to be an act of domestic abuse. Given that both charges to which Johnson pled stemmed from the same course of conduct against the same victim, and because there was a factual basis to establish that the attempted false imprisonment was an act of domestic violence, there was likewise a factual basis to establish that the substantial battery was an act of domestic abuse.

¶16 As support for his position, Johnson cites our unpublished one-judge decision in *State v. O’Boyle*, No. 2013AP1004-CR, unpublished slip op. (WI App Feb. 4, 2014), where we modified a judgment to remove references to domestic abuse and vacated the domestic abuse surcharge. “[A]n unpublished opinion cited for its persuasive value is not precedent, it is not binding on any court of this state. A court need not distinguish or otherwise discuss an unpublished opinion and a party has no duty to research or cite it.” WIS. STAT. RULE 809.23(3)(b). Although we are not required to do so, we will explain why the circumstances of *O’Boyle* are distinguishable from those presented here.

² Johnson argues the complaint’s recitation of his address and the location of the acts both contained a specific apartment number and this specific number was not referenced in these statements attributed to the victim and her neighbor; therefore, he claims it is unclear which apartments the victim and Jackson resided in given that this is a multi-unit apartment building. We are not convinced that the level of specificity Johnson seeks was required.

¶17 O’Boyle was convicted of disorderly conduct as an act of domestic abuse. The issue in that case was not whether the relationship between O’Boyle and the victim qualified under WIS. STAT. § 968.075(1)(a) but whether the complaint alleged *conduct* that fell under the statutory definition. See *O’Boyle*, 2013AP1004-CR, unpublished slip op. ¶22. After comparing the allegations in the complaint with the crimes listed in § 968.075(1)(a)1.-4., this court concluded that O’Boyle’s conduct did not fall within the definition of domestic abuse. See *O’Boyle*, 2013AP1004-CR, unpublished slip op. ¶22; see also *id.*, ¶2 (concluding that “the only evidence in [the] record concerning O’Boyle’s disorderly conduct fail[ed] to fulfill the statutory definition of domestic abuse”).

¶18 In contrast to the insufficient allegations at issue in *O’Boyle*, in this case, there was an adequate factual basis to support the domestic abuse modifier. Because there was a sufficient basis for the circuit court to conclude Johnson’s crimes were committed against an adult with whom he resided, modifying the judgment to remove the references to domestic abuse is not warranted.

(B) *The circuit court made the requisite finding to support the domestic abuse surcharges.*

¶19 Additionally, Johnson contends that he should not have to pay the domestic abuse surcharges because the circuit court never made an explicit finding of a qualifying domestic relationship as is required under WIS. STAT. § 973.055(1)(a)2.

¶20 The imposition of a domestic abuse surcharge is governed by WIS. STAT. § 973.055. That section provides, in relevant part:

(1) If a court imposes a sentence on an adult person or places an adult person on probation, regardless of whether any fine is imposed, the court shall impose a domestic abuse surcharge under ch. 814 of \$100 for each offense if:

(a) 1. The court convicts the person of a violation of a crime specified in ... [WIS. STAT. §] 940.19 ... [or WIS. STAT. §] 940.30 ... ; and

2. The court finds that the conduct constituting the violation under subd. 1. involved an act by the adult person against his or her spouse or former spouse, against an adult with whom the adult person resides or formerly resided or against an adult with whom the adult person has created a child.

Sec. 973.055(1).

¶21 Here, the circuit court ordered Johnson to pay domestic violence surcharges without expressly stating its finding that Johnson and the victim had a qualifying relationship. While an express finding at the time of sentencing would have been preferable, the circuit court made clear in its postconviction decision that it implicitly found Johnson resided with the victim. *See State v. Fuerst*, 181 Wis. 2d 903, 915, 512 N.W.2d 243 (Ct. App. 1994) (The circuit court has an additional opportunity to explain its sentence when challenged by postconviction motion.). In its written decision denying Johnson's motion for postconviction relief, the circuit court explained that the presentence investigation report (PSI) was part of the record and was reviewed by the parties prior to sentencing. The circuit court went on to point out that Johnson did not object to the numerous references in the PSI that he and the victim lived together, and it quoted various excerpts containing remarks to this effect, which were attributed to Johnson.

¶22 Because Johnson did not object to any of the information in the record, including statements attributed to him that showed he was living with the victim at the time of these offenses, the circuit court concluded that it was

unnecessary for it to make an express finding on a factual issue that was not in dispute. Again, while this court would have preferred such a finding, under the circumstances presented, its absence is not fatal. *See id.* Accordingly, we affirm.

By the Court.—Judgment and order affirmed.

This opinion will not be published. *See* WIS. STAT. RULE 809.23(1)(b)5.

